INDEX

CITATIONS

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In the Supreme Court of the United States

October Term, 1962

No. 150

Harold J. Silver, d/b/a Municipal Securities Company and Municipal Securities Company, Inc., petitioners

v.

New York Stock Exchange

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The United States believes that this case presents an important issue, not previously decided by this Court, involving the reconciliation of the antitrust laws and certain provisions of the Securities Exchange Act of 1934. The question is whether, as the Court of Appeals held, a registered securities exchange has an immunity from the Sherman Act for any actions taken "within the general scope of the authority of the Exchange as defined by the 1934 Act" to regulate the conduct of its members (Pet. App. A, 21, 27). The United States believes that this broad ruling creates

an immunity from the Sherman Act that is not justified by the Securities Exchange Act. The importance of this question in the administration of the antitrust laws makes its resolution by this Court appropriate.

STATEMENT

The basic facts are set forth in the opinion of the district court (Def. App. 128–136)[1] and are not in dispute. The two petitioners were engaged in the securities business in Dallas, Texas, as broker-dealers. Municipal Securities Company (the trade name under which Harold J. Silver operated) traded in municipal bonds, and Municipal Securities Company, Inc. (a corporation which Silver organized) traded principally in over-the-counter corporate securities. Both firms were registered with the Securities and Exchange Commission, and both were members in good standing of the National Association of Securities Dealers (an association of over-the-counter dealers registered with the Commission). Neither firm was a member of the New York Stock Exchange.

Private wire connections between over-the-counter dealers and member firms of the New York Stock Exchange who also deal in unlisted securities are important to the conduct of that business. The constitution and rules of the New York Stock Exchange require that private wire connections between members of the Exchange and nonmembers be approved by the Exchange and give the Exchange authority to require the severance of any such connections. These

[1] "Def. App." refers to the appendix for defendant-appellant in the court of appeals.

provisions provide no standards for the exercise of that authority by the Exchange.

In 1958, on the basis of the Exchange's temporary approval, petitioner Municipal Securities Company, Inc. obtained private wire connections with ten of the Exchange's member firms, and also obtained the Exchange's ticker service. (Petitioner Municipal Securities Company had previously obtained private wires to the municipal bond departments of three member firms.) In February 1959, the Exchange, following its investigation of the applications for approval of the wire connections, withdrew its ticker service and directed its members to sever their wire connections with petitioner firms. Petitioners attempted unsuccessfully to ascertain the reasons for the Exchange's action and to obtain a hearing on any charges made against them. The Exchange took the position that it was against its policy to divulge the reasons for its action. The facts developed at the trial show that among the grounds relied on by the Exchange for its action were the Defense Department's suspension of Silver's security clearance in 1953 pursuant to the Industrial Personnel Security Program, and allegedly derogatory information about Silver which the Exchange refused to disclose.

Petitioners then brought this action against the Exchange under the Sherman Act seeking injunctive relief and damages.[3] They alleged that the denial of private wire services was a concerted refusal to deal by the Exchange and its members, in violation of Section 1 of the Sherman Act, and that the with-

[3] They also alleged claims sounding in tort.

drawal of the stock ticker service violated Sections 1 and 2 of the Sherman Act.

The district court (Judge Bryan) granted partial summary judgment for petitioners on the first claim above stated (relating only to private wire connections), and enjoined the Exchange "from preventing, prohibiting or interfering with the establishment, maintenance and operation of private wire and telemeter connections between plaintiffs and defendant's member firms and member corporations for the purpose of trading or otherwise dealing, or communicating with respect to transactions, in over-the-counter securities, municipal bonds, or securities not listed for trading on the New York Stock Exchange." (Def. App. 167–168.) In a lengthy opinion (*id.*, 126–166), the court rejected the Exchange's claim that its action was immune from the antitrust laws. The court ruled that the Exchange's disciplinary authority over its members under the Securities Exchange Act did not extend to the over-the-counter securities market. The court further held that, absent such immunity, the termination of private wire services by the member firms was a concerted refusal to deal which was a *per se* violation of the Sherman Act. The court considered and rejected each of the grounds relied on by the Exchange as justification for its actions (Def. App. 155–159), and concluded that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiffs' wire connections be severed" (*id.*, 159).

A divided court of appeals reversed on the ground that the Exchange's action was immune from antitrust liability. The majority, although acknowledging that "there would be, at the very least, a grave doubt

as to the legality of the action of the defendant if it is not insulated from liability under the Sherman Act for such action by reason of the duties and obligations imposed upon it by the Securities Exchange Act of 1934", held that "the action of the Exchange in bringing about the cancellation of the private wire connections with members of the Exchange was within the general scope of the authority of the Exchange as defined by the 1934 Act and therefore outside the coverage of the Sherman Act" (Pet. App. A, 21). Judge Waterman dissented.

DISCUSSION

The Court of Appeals held (Pet. App. A, 21, 27, 31) that a registered securities exchange has immunity from the antitrust laws for any action taken within the "general scope of the authority" which the Securities Exchange Act gives the exchange to regulate its member firms, and that this immunity covers even action which is "arbitrary or unreasonable." This ruling confers a "blanket exemption from the antitrust law" [4] which insulates from the prohibitions of the Sherman Act an important segment of the business practices of the financial community. The decision is likely to be of particular significance because it was rendered by the Court of Appeals for the circuit in which the country's principal securities exchanges are located and in which most litigation involving them is likely to occur. Since the United States believes that the absolute privilege or immunity which the court below gives to the exchanges is not

[4] Waterman, J. dissenting, Pet. App. A, 35.

justified by the Securities Exchange Act, it urges the Court to review the decision.

The rationale of the majority opinion is as follows: The "basic scheme of the [Securities Exchange] Act contemplates that control over the conduct of members of securities exchanges will be shared by the Securities and Exchange Commission and the securities exchanges themselves, with the Commission exercising general supervisory power over the exchanges' self-regulation" (Pet. App. A, 22). The Exchange's duties are carried out by enforcement of its rules, which must "reasonably * * * be presumed" to "have the approval of the Commission" (*id.*, 27). The policy of the Act "requires that the Exchange exercise these powers fully," and "[i]n the exercise of the powers which they are required by the statute to exercise the exchanges must be immune from prosecution under other legislation" (*id.*, 30). "The Exchange must have sufficient power of discipline over its members to enable it to enforce the high standards of conduct which the Act contemplates" (*id.*, 29). To apply the Sherman Act to action taken by the exchange "within the general scope of its authority to discipline its members," even though the "particular decision is arbitrary or unreasonable * * * would go far toward defeating the statutory policy of self-regulation. If securities exchanges were in constant danger of subjecting themselves to liability under the anti-trust laws for any misapplication of their disciplinary powers, they would understandably be reluctant to fulfill their

obligations under the Securities Exchange Act" (*id.,* 30).

As Judge Waterman pointed out below, the mere fact that Congress has provided a detailed regulatory scheme for an industry does not itself confer antitrust immunity for actions which the industry takes within the general framework of the regulatory pattern. This is true even where such action is taken pursuant to the authorization of a governmental body (*California* v. *Federal Power Commission,* 369 U.S. 482); *a fortiori* it is so where, as here, the action is that of private parties acting as "an extra-governmental agency" performing functions that ordinarily the government itself would perform (*Associated Press* v. *United States,* 326 U.S. 1, 19).

The Securities Exchange Act provides no explicit antitrust immunity for actions taken by registered exchanges.[5] Under settled principles such immunity will be implied only if there is a clear repugnancy between the Act and the antitrust laws, and then only to the extent of such repugnancy. *California* v. *Federal Power Commission, supra,* pp. 485–486; *Georgia* v. *Pennsylvania R.R. Co.,* 324 U.S. 439, 457; *United*

[5] Although the silence of the Act on this point appears to present a contrast with the explicit general immunity given in Section 15A(n) to registered national securities associations, the significance to be attached to the contrast is doubtful inasmuch as Section 15A was not a part of the original Securities Exchange Act of 1934. What is now Section 15A of that Act was an entirely separate piece of legislation enacted four years later, namely, the Maloney Act of 1938 (52 Stat. 1070).

States v. *Borden Co.,* 308 U.S. 188, 198. The basic problem, therefore, is to reach a proper accommodation of the two overlapping but equally salutary statutes, as applied to the present facts.

The Sherman Act proscribes any organized boycott in the course of trade or commerce regardless of its justification. *Fashion Originators' Guild* v. *Federal Trade Comm.,* 312 U.S. 457. In the absence of the Securities Exchange Act respondent's activities would seem plainly unlawful. The Securities Exchange Act, on the other hand, contemplates a considerable degree of private regulation, which may require recognition of some concomitant privilege or immunity. Section 6(b) imposes upon the exchanges the duty to discipline members "for conduct or proceeding inconsistent with just and equitable principles of trade."[6] The United States and the Securities and Exchange Commission fully support several of the rulings in the majority opinion because they strengthen the fabric of investor protection. Thus, the opinion makes clear that an exchange, in regulating the conduct of its members, must consider all of their securities transactions, not just their trading in listed securities on

[6] The fact that an affirmative duty of self-regulation is imposed upon exchanges is emphasized by the full text of Sec. 6(b) which reads—

> (b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

the exchange. We do not suggest that the power to require conduct consistent with "just and equitable principles of trade" could not extend to cutting off private wire service to petitioners because they were non-members dealing in over-the-counter markets.[7] The regulatory functions of adopting and enforcing rules should include whatever is appropriate to prevent conduct which is inconsistent with just and equitable principles of trade, including willful violations of the Act or rules thereunder, and to insure fair dealing and to protect investors. Similarly, the opinion below properly reaffirms the decision of the same circuit nearly twenty years ago in *Baird* v. *Franklin*, 141 F. 2d 238, certiorari denied, 323 U.S. 737, that an exchange must not only enact but also enforce rules for the discipline of its members. The Act contemplates an extensive and effective degree of self-regulation by an exchange, including *inter alia* enforcement, not just adoption, of rules.[8] If any aspect of the

[7] The Commission took an *amicus* position in the Court of Appeals primarily in an effort to overcome certain implications in the district court opinion which appeared to support what the Commission regards as an unduly narrow view of the power and duty of an exchange to regulate the conduct of its members for the protection of investors who may deal with them. The Commission desired that no doubt be cast on the power and duty of a registered exchange to regulate the conduct of its members in all of their securities transactions, including their transactions otherwise than on the exchange.

[8] Pursuant to the Congressional mandate contained in a 1961 amendment of Section 19(d) of that Act (Public Law 87-196), the Commission is currently in the midst of a special study, one of the principal objectives of which is to determine whether the present pattern of regulation of the securities markets, including its self-regulatory aspects, is adequate.

duty of self-regulation were to be seriously impaired, investor protection would suffer. The Commission has neither the power nor the resources to fill completely gaps which might be created by impairment of the function of self-regulation by exchanges.

But while the policy of promoting self-regulation may well require giving registered exchanges an immunity from normal antitrust rules when they are acting against conduct which *is* inconsistent with "just and equitable principles of trade"—and may also require immunity where their action was *reasonable even though mistaken*—there is no need for an *absolute immunity*.

The present case, in its appellate posture, falls in the last category. On the motion for summary judgment the district court found (Def. App. 159), after considering the grounds on which the Exchange sought to justify its action, that the Exchange had acted "arbitrarily and unreasonably in directing that plaintiff's wire connections be severed." The court of appeals did not disturb that finding. The finding itself shapes the legal issue now presented for review, and consequently we do not go behind it to consider either its correctness or whether it would be substantiated by the evidence at a trial. The court below stated (Pet. App. A, 31) that "the procedure of the Exchange in failing to give prior notice of its action and in refusing to inform Silver of the charges made against him and to give him an opportunity to rebut these charges may well be characterized as arbitrary," but held (Pet. App. A, 30) that "this immunity [from the antitrust laws] applies regardless of the correctness or, indeed, reasonableness of a particular decision."

Such arbitrary action by an exchange cannot be justified as the proper implementation of its duty to insure that its members observe "just and equitable principles of trade." The law rarely recognizes a privilege so absolute. Judges and other public officials have such a privilege in cases involving defamatory statements in the course of their duties, *Spalding* v. *Vilas,* 161 U.S. 483, and perhaps the privilege extends to actions for malicious prosecution, *Gregoire* v. *Biddle,* 177 F. 2d 579 (C.A. 2), but usually privileges based upon the public interest depend upon good faith and the reasonableness of the actor's conduct. *E.g., Restatement of Torts,* §§ 119, 143, 147, 196, 204. No exception, applicable to private persons even when acting in defense of the public interest, comes readily to mind. Since the Securities Exchange Act is silent, no greater immunity from normal liabilites, including liability under the Sherman Act, can be inferred.

Nor can immunity be predicated on the theory, adopted by the Court of Appeals (Pet. App. 27), that since the constitution and the rules of the Exchange had been filed with the Commission, "[i]t is reasonably to be presumed that those regulations have the approval of the Commission since it has not taken the action which it is empowered by the statute to take to bring about their amendment." Although an exchange is required to file its rules and regulations with the Commission (Section 6(a)), and although the Commission in certain circumstances may make changes in an exchange's rules (Section 19(b)),[9] an

[9] Section 19(b) authorizes the Commission, if such action is deemed "necessary or appropriate for the protection of inves-

exchange may, without Commission approval, adopt rules which are not inconsistent with the Act and the Commission's rules thereunder, or with applicable State law (Section 6(c)). Thus, it cannot fairly be assumed, as the court below did, that the Commission has approved the particular exchange rules here involved. Indeed, the Commission would hardly have any basis for determining whether these rules comport with the statutory standards of the Securities Exchange Act. The rules merely provide that no exchange member may maintain any wire connection with any nonmember without the prior consent of the Exchange, and that the Exchange may require at any time that any means of communication be terminated (see Pet. App. A, 25–26).

In any event, the Commission has no authority to review action taken by an exchange in applying its rules. The Commission has not approved or disapproved the particular actions of the Exchange upon which this suit is based.

The Court of Appeals suggested (Pet. App. A, 30) that even though petitioners have no cause of action under the antitrust laws, they are not "without a remedy" against arbitrary or unreasonable action by the Exchange. The court did not specify what such remedy might be, and it is far from clear that, apart from the antitrust laws, petitioners would

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tors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange," to require changes in exchange rules dealing with certain enumerated subjects.

be able to vindicate their rights. Furthermore, assuming the availability of an action of tort under State law (presumably for "conspiracy" or intentional interference with advantageous relations), petitioners would again encounter the argument that Section 6(b) and the policy of encouraging private self-regulation give the exchanges a statutory privilege or immunity. There is not the slightest reason for concluding that a modification of the antitrust laws was intended but no change in other sources of liability, and any implied exemptions must therefore be deemed coextensive.

While the willingness and ability of the stock exchanges to exercise their disciplinary powers over members in proper cases is naturally related to the risk of liability and may therefore require recognition of some corresponding privilege or immunity, we think that imposing liability for arbitrary and capricious action is not likely to render an exchange appreciably more reluctant to perform this salutary function. But even if the tendency were established, it would not be sufficient to establish such a repugnancy between the Securities Exchange and the Sherman Acts that the latter can be deemed *pro tanto* repealed. Congress has not seen fit to confer an unqualified antitrust immunity for all action taken by an exchange in the purported exercise of its regulatory authority over its members. If such immunity is to be provided, it is for Congress, rather than the courts, to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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